No.

IN THE

Supreme Court of the United States

PHILLIP GALLEGOS, PETITIONER

v.

JICARILLA APACHE NATION, A FEDERALLY RECOGNIZED INDIAN TRIBE; CLAUDIA VIGIL-MUNOZ, STANFORD SALAZAR, TROY VICENTI, TYRON VICENTI, HERBERT MUNIZ, CARSON VICENTI, LESTER ANDRES, AND RONALD JULIAN, AS TRIBAL COUNCIL MEMBERS AND INDIVIDUALLY; HOYT VELARDE, DOREEN VIGIL, LEESON VELARDE, ISAAC ROYSTON, TIMOTHY ANDERSON, ESTEBAN BLANCO, LILLIAN VENENO, AND TINA GOMEZ, AS TRIBAL EMPLOYEES AND INDIVIDUALLY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a tribal forum is *inaccessible* under the second prong of the 10th Circuit's *Dry Creek Lodge* exception when a fired non-Indian tribal police officer is deprived of his right to call witnesses on his behalf and present his own testimony at a tribal administrative hearing guaranteed under tribal law and regulation?

II. Whether a dispute over the firing of a non-Indian tribal police officer constitutes a matter of "internal tribal affairs" under the third prong of the *Dry Creek Lodge* when it promotes, rather than discourages, the continuation of corruption within the tribe's police department?

III. Whether a tribe can accuse a non-Indian employee of criminal behavior constituting federal felonies and fire him when it could not maintain jurisdiction to prosecute him in its own tribal forums for those same alleged crimes under the holding of *Oliphant*?

PARTIES TO THE PROCEEDING

Petitioner Phillip Gallegos, plaintiff-appellant below, is a non-Indian citizen of the United States of America and a resident of Hispanic descent living near the Jicarilla Apache Nation Reservation in Northwestern New Mexico. Mr. Gallegos was employed as a patrol sergeant by the Jicarilla Apache Nation Police Department.

Respondents, defendants-appellees below, are the Jicarilla Apache Nation, a federally recognized Indian tribe, various elected officials of the Nation's Legislative Council and employees of the Nation.

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PETITION FOR WRIT OF CERTIORARI

Phillip Gallegos, Petitioner, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on November 28, 2003.

OPINIONS BELOW

The Tenth Circuit opinion is unpublished and reprinted in the Appendix (App.) hereto at 1a. That opinion affirmed the memorandum opinion and order of the District Court for the District of New Mexico and Judgment entered in this case on November 19, 2002 and reprinted at App. 18a.

JURISDICTION

The judgement of the court of appeals was entered on November 28, 2003. On February 19, 2004, the Honorable Associate Justice Stephen Breyer of the Tenth Circuit Court of Appeals granted petitioner's application for an extension of time within which to file his petition for writ of certiorari, extending the time to April 26, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 10(c), in that the Tenth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

RELEVANT PROVISIONS

1. Provisions of the Indian Civil Rights Act ("ICRA"or "Act") of 1968 (25 U.S.C. § 1302), "Constitutional rights", provide in pertinent part:

No Indian tribe in exercising powers of self-government shall: (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

2. Article IV § 2(h), "Rights of Members", Revised Constitution of the Jicarilla Apache Nation (JAN) provides the same protections as 25 U.S.C. § 1302(8).

3. Title 19, Chapter 1, § 5 (a)(b)(c), JAN Tribal Code, governing formal grievances is reprinted at App. 36a - 39a.

INTRODUCTION

This case presents issues of extraordinary national importance to the due process and equal protection rights of thousands of non-Indian tribal employees diligently and sincerely working for tribal governments within the jurisdiction of the Tenth Circuit Court of Appeals. The Tenth Circuit has carved out a narrow exception in *Dry Creek Lodge, Inc. v. United States*, 623 F.2d 682 (1980) to the Court's holding in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), that the ICRA was not to be interpreted as an unequivocal congressional general waiver of tribal

sovereign immunity in federal courts. The *Dry Creek Lodge* exception serves as a distant "beacon light" to those non-Indians caught in a tangle of tribal intrigue and ill-will that prevents them from accessing a tribal forum where they may remedy particularly egregious allegations of personal restraint and deprivation of personal rights by tribes in the Tenth Circuit. However, the Tenth Circuit has abdicated its responsibility to insure that the lower courts correctly apply the *Dry Creek Lodge* exception to factual allegations in actions filed against tribes under the ICRA, thus, making their struggle toward justice impossible.

In *Santa Clara Pueblo v. Martinez*, the Court stated that the substantive rights created by the ICRA must be vindicated through tribal forums which are obliged to apply the Act. *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984). Fired non-Indian tribal employees are compelled to seek relief through tribe's court system or tribal administrative processes. Denial of relief through the tribal forums constitutes a deprivation of the non-Indian employee's right to protect his job and reputation from unjustified attack. A blemish on a tribal employee's employment record affects him both on and off the reservation and severely impacts on his ability to provide for his family's basic needs. Where a fired and "blacklisted" non-Indian law enforcement employee lives on his own property near a remote reservation such as at the JAN in NW New Mexico, extreme hardship is imposed on him and his family when he is forced to find a job in distant areas.

STATEMENT

This case presents a question about what constitutes the proper application of the *Dry Creek* exception to situations where non-Indians allege in the federal courts that their right to due process and equal protection *within tribal forums* were ignored or obstructed by a tribal sovereign to a point where access to the tribal forum is blocked - a half-measure of tribal due process is no measure at all.

At issue here is a dispute thrust upon Phillip Gallegos, a Hispanic JAN police officer, by his termination from tribal employment on October 2, 2000.[1] In instances where a tribal employee is fired from his job, the employee expects that he will be able to appeal his firing through a fair and impartial tribal administrative process giving him a degree of due process. The JAN has an established grievance procedure so that its employees, tribal and non-tribal, can contest their firings. See App. 36a - 39a. When a tribal member is fired for exactly the same reasons as the non-Indian and is subjected simultaneously to precisely the same tribal grievance procedures as the non-Indian, an ICRA equal protections issue arises when the tribal member is reinstated and the tribal

[1] When fired, Officer Gallegos was denied access to his personal equipment consisting of a Colt Jr., a 45 cal. backup, flashlights, handcuffs, batons, posse box, gloves binoculars, minolta camera and case, file case, roller meter, Torrance P.D. shirt and a polaroid camera valued at $3,092.00. The property was stolen from his "secured" office at the JAN PD station soon after his firing. A.5, ¶ 22.

member is not. A.5, ¶ 42.[2]

Further, this case presents a question about what constitutes a "dispute" falling outside of internal tribal affairs that will satisfy the last prong of the three prong *Dry Creek* test. Even assuming that this Court's decision in *Santa Clara Pueblo v. Martinez* must be strictly adhered to in respect to tribal sovereignty, this case presents questions concerning what constitutes a "narrow tailoring" of the Tenth Circuit's *Dry Creek* judicial exception to achieve that goal. Despite the obvious tension, *Santa Clara Pueblo* and *Dry Creek* are not necessarily inconsistent *if* the lower courts engage in a meaningful review of the ICRA complaint's factual allegations. Respect for the tribe's inherent sovereignty is achieved *if* the lower courts cautiously balance the valuable tribal interest against unnecessary intrusions in its internal affairs against an equally valuable interest of individuals seeking their "day in court" in a tribal forum. Equal respect must be accorded to the non-Indian employee's ability defend against scurrilous, frivolous and wholly unsupported charges that he was fired because he engaged in criminal activity amounting to the commission of federal felonies. A.5, ¶ 22.

Petitioner Gallegos submits that the holdings in the U.S. Supreme Court case of *Martinez v. Santa Clara* and the 10th Circuit Court of Appeals decision in *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes* may be safely reconciled so that the factual allegations

[2] Citations herein, other than to the App. filed with this petition, are to numbered documents in the Appendix (A) filed by petitioner in the Tenth Circuit.

he set out in his federal civil rights action filed on August 30, 2002 can undergo proper review at both district court and circuit levels. In this regard, Petitioner raises the following questions:

1) Whether a tribal forum is *inaccessible* under the second prong of the 10th Circuit's *Dry Creek Lodge* exception when a fired non-Indian tribal police officer is deprived of his right to call witnesses on his behalf and present his own testimony at a tribal administrative hearing guaranteed under tribal law and regulation?

2) Whether a dispute over the firing of a non-Indian tribal police officer constitutes a matter of "internal tribal affairs" under the third prong of the *Dry Creek Lodge* when it promotes, rather than discourages, the continuation of corruption within the tribe's police department?

3) Whether a tribe can accuse a non-Indian employee of criminal behavior constituting federal felonies and fire him when it could not maintain jurisdiction to prosecute him in its own tribal forums for those same alleged crimes under the holding of *Oliphant*?

I. FACTUAL BACKGROUND

A. Plaintiff - On October 2, 2000, plaintiff Gallegos, a non-tribal member, was served with notice that he had been terminated from employment with the JAN Police Department ("PD") upon allegations that he had violated provisions of the JAN Personnel Policies and Procedures. A.5, ¶ 26. All through his

tribal ordeal, Officer Gallegos has only been able to determine that he was accused by defendant Hoyt Velarde, JAN Executive Director of Public Safety, of embezzling tribal monies, misappropriating tribal funds for the personal gain of his relatives and stealing two (2) sniper riles and AR-15 rifles owned by the JAN PD. *Id.*, ¶ 22.

On October 13, 2000, Gallegos filed a grievance hearing request form seeking any information on why he had been terminated. *Id.*, ¶ 30. The hearing on Officer Gallegos' grievance commenced on March 2, 2001. *Id.*, ¶ 40. Gallegos' hearing was consolidated with the grievance hearing of Alan Tafoya, the ex-Acting Chief of the JAN PD. *Id.* The entire proceeding came to a halt on the morning of Friday, March 3, 2001, when the Tafoya grievance panel ruled that his firing had been executed in violation of the administrative procedures contained in the JAN Personnel Polices & Procedures. *Id.*, ¶ 42. Officer Gallegos' termination was upheld although *his* panel refused to hear his case-in-chief that would have proven that he was fired by management for reporting corruption and wrongdoing within the JAN PD. App. 41a - 42a. In contrast, Alan Tafoya, a member of the JAN, was "reinstated" by his panel on the basis that the "personnel manual was not followed" and on the basis that he had not acted in a "dishonest, neglectful or criminal manner." A.5, ¶ 42; App. 43a.

On March 17, 2001, plaintiff Gallegos formally appealed his Panel's decision to Claudia Vigil-Muniz, President of the Nation's Legislative Council, to uphold his termination without giving him a chance to put on his case-in-chief to prove that his firing was the

result of a conspiracy by defendants to punish and retaliate against him for his "whistleblowing" activities. A.5, ¶ 43. Gallegos exhausted his tribal administrative remedies on March 28, 2002, over a year later, when he received formal notice that the JAN Legislative Council had upheld his firing. *Id.*, ¶ 48. A decision of the Legislative Council in an employment matter is final. It is clear from the record established in the lower court that Officer Gallegos consistently appealed his October 2000 firing because the JAN did not grant him access to the most fundamental part of the grievance proceeding - his right, under tribal administrative regulations, to put on his testimony and call witnesses to testify in his favor. At all points in the course of exhausting tribal forum remedies, Officer Gallegos raised the deprivation of his right to present his own defense yet the JAN refused to even listen to his deprivation of fundamental due process and equal protection argument.

B. Tribal ICRA Policies and Administrative Grievance Practices

1. Tribal ICRA Laws - Art. IV, JANC, § 2(h), "Rights of Members", states that the JAN, in exercising its powers of self-government shall not "[d]eny to *any person within its jurisdiction* the equal protection of its law or deprive any person of liberty or property without due process of law." (Emphasis added.) Any resolution, ordinance or other enactment which, by the terms of the JAN constitution or in conformity with applicable Federal law must be approved by the Secretary of the Interior . . . .". *See* JANC, Art. XI, "Powers of the Tribal [Legislative] Council", § 2.

Undoubtedly, the ICRA is a "law" of the United States of America and the JAN is obligated, pursuant to the terms its own Amended Constitution and Ordinances, to abide by the due process and equal protection provisions of the ICRA engrafted in its governing document. JANC § 19-2-(A)-(3), "Equal Opportunity" states "[t]he [JAN] Government, *in accordance with the applicable provisions of the laws of the United States*, shall not favor or discriminate against any person because of race, color, sex, age, religion, national origin, ancestry, political party affiliation, or handicap. (Emphasis added.)

2. Tribal Administrative Grievance Practices - The JAN administrative grievance procedures accessible to tribal employees is very detailed and provides an understandable step-by-step procedure for handling employment disputes. Despite the existence of tribal regulations mandating the JAN to hear Officer Gallegos' defense, he *never* had an opportunity to present testimony through the statements of witnesses at any grievance and appeal panel hearings. App. 38a.

II. PROCEEDINGS BELOW

A. The District Court - The District Court held that two of the three *Dry Creek* requirements were not met. App. 23a. Gallegos' complaint set out allegations that Gallegos' tribal appeals were directed toward the JAN refused to allow him *full and guaranteed access* to the "tribal forum" so he could present his defense at the March 2001 hearing. Despite the existence of these allegations, Judge William P. Johnson held that a tribal forum was available. App.

23a. Without any discussion on the allegations raised in Gallegos' complaint about rampant pervasive corruption within the JAN PD, Judge Johnson concluded: "Nor can I conclude that what is at heart a wrongful termination action does not concern tribal issues, which would bring the case within the *Dry Creek* exception." *Id.* The District Court's decision fails to discuss the facts plainly alleged in Officer Gallegos' complaint that the grievance panel held a hearing for Alan Tafoya, the tribal member, but stopped short of allowing him to proceed with his defense against the firing. Similarly, the lower court's decision does not offer any meaningful analysis of the facts in *Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir. 1999), *EEOC v. Karuk Tribal Housing Authority*, 260 F.3d 1071 (9th Cir. 2001) or the *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989) in relation to the complaint's factual allegations. The District Court simply lumped three cases together and stood on them where there were no allegations under review in those cases that the Tribe, its officials and employees had conspired to fire anyone to promote and protect corruption within the tribe's police department.

The District Court reasoned that its narrow application of the *Dry Creek* test to Officer Gallegos ICRA complaint would promote the interest of tribal immunity described in *Nero et al. v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1460 n. 5 (10th Cir. 1989).

B. The Court of Appeals - The Tenth Circuit characterized the District Court's opinion as "well-reasoned and thorough". App. 4a. The Circuit Court agreed with the lower court's conclusion that a "tribal forum was available". In affirming the lower court's

finding on the second prong of the *Dry Creek* exception, the Tenth Circuit Panel looked toward *Olguin v. Lucero*, 87 F.3d 401, 404 (10th Cir. 1996), where the plaintiffs had a pending case on the same events and transactions in the tribal court: "The crucial distinction is the plaintiffs in *Dry Creek Lodge* were prevented from even filing a cause of action in tribal court and were instead directed to use "self help", while the appellants currently have a cause of action pending before the tribal court." *Id.* at 7a. Olguin is inapplicable to the clear facts in the record made at District Court level. When Gallegos' counsel asked why he could not put on his defense to his firing when it was his time to do so, he was told by his grievance panel that it had heard enough. Gallegos was not only "severely" limited in his ability to present evidence, he was flat out denied *any* way to have his grievance heard. It cannot be seriously doubted that Officer Gallegos had wholly exhausted his tribal remedies to object to the fact he had been denied a hearing in the tribal forum by the time he filed his federal ICRA civil action in the U.S. District Court, District of New Mexico. Gallegos was permitted by his grievance panel to give his opening statement of what he would prove but nothing more. App. 47a - 51a.

Without any searching analysis of Judge Johnson's "well-reasoned and thorough" opinion, the Panel simply spliced his third prong reasoning into its Order and Judgment. By doing so, the Tenth Circuit Panel missed the key point alleged by Gallegos that his October 2000 firing was the direct result of conspiracy among tribal officials and employees to stop him from divulging to federal authorities proof of pervasive corruption within the JAN PD. Where a tribal police

officer reports evidence that other fellow police officers are committing violations of tribal and federal criminal laws and is fired because of it, the dispute over the firing impacts on tribal matters that are not completely "tribal internal" in nature. Where the tribal forums consistently deny access of tribal remedies or tribal forums affirm the denials of due process and equal protection so corruption in the JAN PD will continue, the dispute becomes one that reaches beyond the confines of the JAN reservation and into an area of federal governmental concern. The Tenth Circuit Panel utterly ignored any meaningful discussion on the "corrupt" nature of the allegations in his ICRA complaint and their bearing on whether this might have pushed the question of federal jurisdiction in favor of Officer Gallegos.

The Circuit Court will not deign to engage in a thorough review of the lower court record where an police officer's job and reputation are at stake but it will quickly jump to punish Officer Gallegos' attorney for the filing of a "frivolous" appeal in an amount around $2,000 more than what was stolen from him by his own "fellow" JAN PD officers right after he was fired in October 2000. A. 12a - 15a; A.5, ¶ 22.

REASONS FOR GRANTING THE WRIT

I. THE QUESTIONS CONCERNING THE TENTH CIRCUIT'S APPLICATION OF THE *DRY CREEK* TEST TO GALLEGOS' ICRA COMPLAINT ARE OF EXTRAORDINARY NATIONAL IMPORTANCE AND SHOULD BE DECIDED BY THE COURT.

In the 1980 case of *Dry Creek Lodge v. Arapahoe and Shoshone Tribes*, supra., the Tenth Circuit established a rule that should provide a jurisdictional basis for Gallegos' claims and a waiver of the JAN's sovereign immunity. *Santa Clara Pueblo v. Martinez*, supra. held that the ICRA was not to be interpreted as an unequivocal congressional general waiver of tribal immunity in federal courts. In order to maintain a federal ICRA action under the *Dry Creek Lodge* exception, a non-Indian plaintiff must allege in his complaint a "particularly egregious allegations of personal restraint and deprivation of personal rights. . ." . *Ramey Const. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 319 (10th Cir. 1982). The language of *Dry Creek Lodge*, at 685, follows:

> It is obvious that the plaintiffs in this appeal have no remedy within the tribal machinery or with the tribal officials in whose election they cannot participate. The record demonstrates that plaintiffs sought a forum within the Tribes to consider the issue. They sought a state remedy and sought a remedy in the

> federal courts. The limitations and restrictions present in *Santa Clara* should not be applied. There has to be a forum where the dispute can be settled.

Dry Creek Lodge creates an exception based on "absolute necessity".

Since 1980, non-Indians and non-tribal entities have clamored to use the *Dry Creek Lodge* exception to seek resolution of their claims against tribes. *See Kenai Oil and Gas, Inc. v. Dept. of Interior*, 522 F. Supp. 521, 529-531 (D. Utah 1981) ("Only where plaintiffs' efforts to obtain a tribal remedy have demonstrated that no such remedy is available will this court take jurisdiction."); *Ramey Const. v. Apache Tribe of the Mescalero Reservation*, supra, at 319, fn. 4 ("That case involved particularly egregious allegations of personal restraint and deprivation of personal rights that are not present in this action."); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1346 (10th Cir. 1982) ("And *Santa Clara Pueblo* (citations omitted), reminds us that a proper respect for tribal sovereignty itself and for the plenary authority of Congress in this area "cautions that we tread lightly in the absence of clear indications of legislative intent [to waive tribal sovereign immunity]"); *White v. Pueblo of San Juan*, supra. at 1313 ("This broad definition of tribal immunity and the Supreme Court's concern for restricting federal intrusions into self-government would be undermined if this court would further limit the immunity applicable to the tribes."); *Enterprise Mgt. Consultants v. U.S. ex rel. Hodel*, 883 F.2d 890, 892 (10th Cir. 1989); *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1460 (10th Cir. 1989) ("We agree that plaintiffs do not fit within

the exception outlined in *Dry Creek Lodge*, ar exception this court has narrowly construed."); and *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1170 (10th Cir. 1992) ("The *Dry Creek* exception to sovereign immunity clearly does not apply where a party voluntarily chooses not be pursue its case in tribal court."). However, the Tenth Circuit approach toward affirming lower court dismissals of ICRA actions without a more than a cursory review of the findings below creates an imbalance always favoring tribal sovereign immunity against the ICRA rights of non-Indians on the reservation. There is no need to keep an extremely significant 1980 rule behind closed doors when circumspect cautious application of the rule in this new century is long overdue.

It is exceedingly rare that anyone has succeeded in maintaining an ICRA action by asserting the *Dry Creek Lodge* exception. *Little Horn State Bank v. Crow Tribal Court*, 690 F.Supp. 919, 921-22, a case arising in the 9th Circuit, is one instance where factual allegations were found by a district court sufficient for the maintenance of federal jurisdiction. There, the determining factors related to jurisdiction were 1) the underlying cause of action arose out of a financial transaction that took place outside of the boundaries of the reservation and 2) the record reflected that there were no further adequate tribal remedies available to plaintiff. Chief Judge Battin was not afraid of issuing a scathing condemnation of the tribal forum at issue in *Little Horn State Bank*, at 923, by calling the Crow Tribal Court a "kangaroo court": "While the tribal members enjoy the protections of their rights under both the United States Constitution and the ICRA, depending on the forum, it appears that non-Indians

are not granted the same privilege of dual citizenship in Tribal Court."

On March 20, 2003, the Tenth Circuit affirmed, in *Kennedy v. Hughes*, No. 02-2112 (D. New Mexico), the district court's dismissal of plaintiffs' suit:

> We have held that our holding in *Dry Creek* must be interpreted narrowly to avoid conflict with the Supreme Court's decision in *Santa Clara*. *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984). In order for the *Dry Creek* exception to apply, "[a] plaintiff must demonstrate: the dispute involves a non-Indian party; a tribal forum is not available; and the dispute involves an issue falling outside of internal tribal affairs." *Ordinance 59 Ass'n v. U.S. Dep't of the Interior Sec'y*, 163 F.3d 1150, 1156 (10th Cir. 1998)(footnote omitted.)

A. AVAILABILITY OF A TRIBAL FORUM

The JAN unilaterally cancelled Officer Gallegos' tribal administrative grievance in "mid-stream" and before he was able to testify on his own behalf. The lower courts could not see the glaring due process issue of Gallegos' lack of access to a tribal forum to present a defense against his termination. He could not refute unfounded and false charges that he violated tribal and federal criminal laws. The record below proves that, as of January 30, 2001, the United States Department of the Interior, Bureau of Indian Affairs (BIA), did not have any investigations open on Officer Gallegos for

any reason. A.5 ¶ 57. What the Tenth Circuit Panel has done is to turn a "blind-eye" and a deaf ear to the cries of United States Citizens, like Officer Gallegos, who have undergone the horror of a "kangaroo" tribal grievance proceeding that was nothing more than a "blatantly arbitrary denial of due process." *Little Horn State Bank*, supra. These abuses have "lamed" Officer Gallegos and his family. Yet his cries for justice are branded by an insensitive system of federal justice as "lame efforts". App. 30a.

Where recourse to the most significant part of the tribal remedy is prevented, as in Officer Gallegos' situation, a plaintiff must have access to a federal forum to protect his livelihood and professional reputation. Indeed, where a tribal sovereign engages in actions designed to obstruct a non-Indian employee's ability to protect his tribal employment rights through available tribal forums, recourse to the federal courts is an *absolute necessity*. Otherwise, a deft tribe can successfully thwart a fired non-Indian employee's rights though a series of cunning maneuvers that appear on their face to give the released worker due process but, in reality, offer nothing more than a sham proceeding similar to that condemned in *Little Horn State Bank*. This sort of behavior results in a mockery of every American citizen's fundamental right to due process - a half-share of tribal due process is no due process at all.

In a ruling with profound implications upon the substantive rights of non-Indians, created by the ICRA, to due process and equal protection in tribal forums, the narrow exception or "escape route" provided by *Dry Creek Lodge* must be properly applied

by the federal courts *if* the record sufficiently alleges that a tribe engaged in obstructionist tactics to dodge altogether its ICRA obligations. However, the Tenth Circuit's November 28, 2003 decision against Gallegos held, in effect, that the JAN was free of any ICRA liability whatsoever for its failure to give him the full benefit of a tribal grievance proceeding, thus depriving him of his right to testify on his own behalf and call witnesses. Had Officer Gallegos not been stopped from presenting his case against his firing to his three member grievance panel, he would have proven that his firing was wrongful and the result of conspiracy among fellow JAN police officers to prevent him from reporting to tribal and federal officials about their corrupt and unlawful activities. A.5, ¶¶ 52-53. In so ruling, the circuit court has jeopardized the implementation of the only viable exception or "escape route" from the traditional sovereign immunity bar from suits against Indian tribes in federal courts. In circumstances where a plaintiff properly alleges a type of "egregious" injury at the hands of a callous uncaring tribal government causing loss of his job and reputation, there arises a constitutional deprivation redressable in the federal courts under the ICRA.

B. EXISTENCE OF A "DISPUTE" INVOLVING INTERNAL TRIBAL AFFAIRS".

The Tenth Circuit's ruling in this case comes as a stun to non-Indian employees, like Officer Gallegos, who are powerless to raise issue with corrupted internal tribal procedures that devastate their rights to due process and equal protection accorded to them under the ICRA. A tribal employment "dispute", so

closely related to the alleged efforts by the Tribe, its officials and employees to cover up and promote continued corruption within the JAN PD, cannot arise to the level of a legitimate governmental interest owed any degree of legitimacy or respect under the third prong of the *Dry Creek Lodge* exception. Maintaining corruption within the JAN PD by the firing of an honest police officer reporting the corruption to "outside" federal law enforcement officials can never become a matter that is material or essential to tribal self-government, at least *not* in the United States of America.

As a non-Indian who has chosen law enforcement as his profession, an accusation of criminal behavior that resulted in Gallegos' firing will, in all probability, deprive him of any opportunity to carry a badge and enforce laws off the reservation or on any reservation in the United States. Defendant Hoyt Velarde told a New Mexico law enforcement official that "plaintiff had embezzled tribal monies, misappropriated other funds for the personal gain of relatives of plaintiff, stolen two sniper rifles and several AR-15 rifles belonging to the Nation's Police Department, acts constituting federal felonies." A.5, ¶ 22. This unique array of factors makes the dispute under review here one that is not entirely confined on the JAN reservation. Nor is the promotion of JAN PD internal corruption through Gallegos' firing entirely a matter wholly inside the ambit of "internal tribal matters." This is not a situation where Gallegos is quibbling over the application of state law to a termination from a tribal job he claims is regulated by state law as in *Penobscot*

Nation v. Fellencer, supra.: "When the Nation acts on "internal tribal matters," its actions are not subject to regulations by the state."

Justice Thomas recently stated in his concurring separate opinion, at 8, in *U.S. v. Lara*, 541 U.S. ___ (2004) that" [p]urely "internal" matters are by definition unlikely to implicate any federal policy." Police corruption on the reservation became a matter of outside federal policy and interest when federal officials from the BIA Office of Law Enforcement Services verified the legitimacy of Officer Gallegos' internal investigations that JAN PD officers were engaging in corrupt activities: "It is clear that a federal official, Theodore R. Quasula, investigated reports of internal fraud and corruption and submitted to the federal government by Gallegos and those charges were substantiated." A.5, ¶ 18. Further, the District Court recognized that an element of "outside" interest was evident in Gallegos' ICRA claims: "He reported the misconduct of tribal officials and police officers to the Acting Chief of Police, which then allegedly resulted in a request for investigation by federal law enforcement officials." App. at 31a. The District Court also referred to the possibility of a federal grand jury investigation. *Id.* When the JAN acts on "internal tribal matters" there should be absolutely no presence of "outside" federal officials such as the BIA Office of Law Enforcement Services and Federal Bureau of Investigations into the commission of federal crimes "outside" the jurisdiction of the JAN self-governance

authority to prosecute.

The Gallegos ICRA claims inject entirely new elements into a doctrine that the Tenth Circuit has devalued to a worthless status. *Dry Creek Lodge* was a case decided on a static situation involving access by non-Indians to their land. The Gallegos case cannot be viewed in traditional *Dry Creek Lodge* terms since it clearly involves and implicates matters of concern, tribal police corruption and employment, that are federal in nature and not entirely bounded by the geographic boundaries of the JAN Reservation. *See Haddle v. Garrison*, 119 S. Ct. 498 (1998). In this same way, the "property right" at issue is not merely one entirely bounded by a job on the JAN Reservation. As a certified law enforcement officer, the property right maintained by Gallegos is his ability to apply for and obtain employment in an extremely sensitive area requiring the highest degree of professional and personal honesty, integrity and trustworthiness. In this modern century, with a dramatic increase of non-Indian employees living on tribal reservations or coming daily on to those reservations, the *Dry Creek Lodge* exception must be accessible to Gallegos and others in his situation, allowed to evolve and not suffer condemnation behind closed doors for the sake of allowing the JAN to dodge its ICRA obligations.

Significantly, Officer Gallegos cannot vote in tribal elections to effect changes to any aspect of a tribal government gone "wild". In such a powerless and weakened position, it is extremely important for the Tenth Circuit to recognize that non-Indian employees like Gallegos must be able to protect their

right to continued tribal employment in the federal courts by invoking the narrow *Dry Creek Lodge* exception. This must be the course taken when "rogue" JAN police officers and JAN employees intended to deprive Officer Gallegos and the JAN administrative process went only "half-way" with its ICRA due process guarantees.

The key issue is whether any legitimate tribal interest is served when JAN is allowed to obstruct Officer Gallegos' right to a fair hearing and then hide behind *Santa Clara Pueblo v. Martinez* to evade federal court review for its calculated failure to give him any measure of due process in the tribal forum. The Tenth Circuit's decision contravenes its own 1980 precedent that it put in place as a safeguard against the whimsey and callous maliciousness of tribes toward non-Indian land owners trying to access their property to promote their business interest. There is no reason why hardworking and dedicated non-Indian employees should be denied access to the *Dry Creek Lodge* exception so they may also protect their "property rights" to their employment. Employees in the same shoes as Gallegos, enforcing tribal and federal laws on reservations in "Indian Country" in the 10th Circuit, will never report internal corruption within tribal police departments if they know they can be fired and denied meaningful due process and equal protection at their tribal grievance hearings. Errant and corrupt tribal officials and employees, embolden by dismissal of cases like that filed by Officer Gallegos, will be given free license to terrorize their non-Indian employees with

wrongful terminations knowing that, by "tweaking" the internal tribal procedures, egregious violations of non-Indians' ICRA rights will never see the light of day in the federal courts.

This case is not about Gallegos' "dissatisfaction" with the tribal grievance panel's decision to uphold his firing: it is about the decision of the panel to prohibit him from presenting his case-in-chief as guaranteed under the JAN Tribal Code. Accordingly, this Court should grant the petition and reaffirm the sanctity of those substantive rights ICRA guaranteed by the Act to non-Indians who are powerless to correct misaligned tribal forum procedures except through the Tenth Circuit's own *Dry Creek Lodge* exception.

II. THE TENTH CIRCUIT DECISION CREATES A BAD RULE REGARDING THE DISTRICT COURT'S DUTY TO REVIEW THE ALLEGATIONS IN A FEDERAL ICRA CIVIL ACTION TO DETERMINE WHETHER THE *DRY CREEK LODGE* EXCEPTION CONFERS AN "ESCAPE ROUTE' VIA FEDERAL JURISDICTION.

The Tenth Circuit decision in this case represents an unnecessary limitation on the use of the *Dry Creek Lodge* exception that almost *always* favors tribal immunity over the federal and tribal ICRA rights of non-Indians. This imbalance is the result of the manner that the Tenth Circuit Court of Appeals applies this "escape route" rule, a rule anchored in simple justice and fair treatment to citizens of the State of New Mexico and the United States of America. There

must be access to the federal courts in situations where a plaintiff adequately accuses a tribe in his ICRA action of depriving him of a forum to challenge his termination from tribal employment. There is no legitimate reason why the 10th Circuit Court of Appeals exception announced in *Dry Creek Lodge* should be extended and not condemned by a narrow application of the rule where circumstances cry for justice.

District courts should be reversed on appeal and directed to hear evidence supporting a non-Indian plaintiff's allegations that the tribal forum was so procedurally corrupted that the tribal forum was, in effect, not available as a place to remedy his dispute. This approach would recognize that the plaintiff has the burden of making a threshold showing in his pleadings that plainly alleges an "egregious" malignant corrupted hearing and tribal appellate proceeding that forecloses all remedies in the "tribal forums". It also safeguards any overly invasive intrusions by the district court into internal tribal matters while setting parameters for plaintiffs so they will be duly noticed of their evidentiary burdens. As it is in these circumstances, a cursory analysis with no detailed review of Officer Gallegos' allegations that access to tribal forums was blocked can only lead to a judicially created "cul-de-sac" where tribal forums will be characterized as always *fully* accessible to the aggrieved non-Indian employee.

District Courts should hear evidence supporting a non-Indian plaintiff's allegation that his firing from the tribe's police department was based upon an illegal conspiracy of co-employees, who were the subject of an "outside" federal investigation, since this does not fall exclusively within the exercise of a tribe's legitimate

self-governance interest. There is no question that major allegations made by Gallegos in his ICRA causes of action were wholly ignored or swept to the wayside in summary fashion. The District Court's characterization of Gallegos' as only expressing his "dissatisfaction" with the decisions of the tribal forum shows a disregard for the principle that the allegations are to be taken as true on motion to dismiss and all reasonable inferences are to be drawn in favor of the plaintiff. *Housing Authority of the Kaw Tribe v. City of Ponca City*, 952 F.2d 1183, 1187 (10th Cir. 1991). App. 20a.

Further, the District Court's conclusion that Gallegos' ICRA causes of action was a wrongful termination not within the *Dry Creek* exception presumes that every job held by a non-Indian on the reservation automatically concerns *only* "tribal issues". In an era of massive tribal economic activity on reservations within the jurisdiction of the 10th Circuit Court of Appeal, this view is simply not reality. The phenomena of gambling on Indian reservations Nationwide has created a variety of jobs broad ranging in their impact on both federal and state regulatory concerns. Officer Gallegos' duties on the JAN Reservation included a broad variety of law enforcement responsibilities not only tribal but also federal and state in scope. Where sexual assault of tribal juveniles by JAN PD officers and where immigrants are robbed while under detention by the JAN PD, the situation takes on federal and international human rights dimensions. App. at 48a - 50a. It is certainly not proper for the lower courts to engage in a glancing review and analysis of a plaintiff's ICRA claims and condemn his appeal as "frivolous".

Failure by the district court to engage in an extensive analysis of the complaint insures that the competing but equally significant interest established in *Santa Clara Pueblo v. Martinez* and *Dry Creek Lodge* will never be reconciled. A valuable "escape route" to a federal court ICRA remedy will always be denied to loyal non-Indian employees like Officer Gallegos.

Officer Gallegos screamed in his federal ICRA action that procedural error or irregularity within the "tribal forums" denied him a fundamental right to due process and equal protection under the law but these cries were downgraded or flatly ignored by both the district court and the Tenth Circuit Court of Appeals. In the face of these plain factual allegations, the lower and appellate courts bent over backwards and in favor of tribal sovereignty to rule that Gallegos had not met the second and third prongs of the *Dry Creek Lodge* exception. As a consequence, non-Indian employees rights to fundamental due process and equal protection are "fair game" and open to abuse by tribes no matter if the employee pleads a plethora of egregious actions by the tribe toward him and those allegations are ridiculed by the tribe as "frivolous" on motion to dismiss.

III. WHETHER A TRIBE CAN ACCUSE A NON-INDIAN EMPLOYEE OF CRIMINAL BEHAVIOR CONSTITUTING FEDERAL FELONIES AND FIRE HIM ON THAT BASIS IF IT COULD NOT MAINTAIN JURISDICTION TO PROSECUTE HIM IN ITS OWN TRIBAL FORUMS FOR THOSE SAME CRIMINAL ALLEGATIONS UNDER *OLIPHANT*.

The Tenth Circuit labeled Gallegos' lawyer's references to *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) as "bizarre" and a "grave mischaracterization" of Gallegos' firing by the JAN as an exercise of criminal jurisdiction. App. 13a-14a.

It is no great task to identify various elements directly related to the commission of federal felonies within the fact pattern alleged by Officer Gallegos in his ICRA complaint. In the face of abounding allegations in Gallegos' complaint that his firing was based on his commission of federal crimes, the Tenth Circuit commented: "Rather, he first references facts not alleged in the Complaint, which is impermissible on a motion to dismiss." App. 13a.

"Indeed, the Court in *Duro* relied on *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), which held that tribes could not enforce their criminal laws against non-Indians." *U.S. v. Lara*, 541 U.S. ___ (2004) (Justice Thomas concurring by separate opinion at 8). Similarly, the Major Crimes Act, 18 U.S.C. § 1153, would also prohibit the JAN from prosecuting Officer Gallegos for committing crimes on the Reservation constituting

federal felonies like theft of firearms or embezzlement of tribal funds. Using facts pled in his ICRA complaint directly relating to crimes covered by the federal Major Crimes Act as a jumping off point, Gallegos argued in his Opening Brief, at p. 19, before the Tenth Circuit this significant matter of tribal-federal jurisdiction:

> At the heart of this issue is whether the Nation can skirt and evade *Oliphant* by allowing its employees to make vague and unspecified accusations of criminal and dishonest behavior against Gallegos and then proceed to terminate him but never give him a chance to refute the accusations with his own testimony and his own witnesses. For this significant reason, the *Dry Creek Lodge* [exception] should be applied to this case.

It cannot be doubted that Officer Gallegos and his legal counsel, Dennis G. Chappabitty, correctly raised an issue far from "bizarre" but of a national character when they argued the "*Oliphant* - lack of tribal criminal jurisdiction" issue before the Tenth Circuit. As correctly stated by Gallegos above, where a tribe openly accuses a non-Indian employee of committing federal felonies and fires him without referral to the Office of the United States Attorney for investigation and prosecution, the "egregious" element of *Dry Creek* tilts in favor of Gallegos and federal jurisdiction. No one can disagree that testimony by witnesses called against Gallegos by the JAN that he stole firearms owned by the Nation influenced his firing in the absence of proof in the record below that he was able to refute these false allegations at his formal

grievance hearing. A.5, ¶ 54.

Where a tribe fails to recognize that it cannot use its internal administrative personnel policies and procedures to invade the provinces wholly reserved to the United States Department of Justice, the JAN's "firing of Mr. Gallegos" becomes an illegal exercise of the Nation's "criminal jurisdiction" that must be raised in a federal ICRA civil complaint. App. 14a. Where, the District Court and the Tenth Circuit fail to recognize this blatant intrusion by the JAN *into* federal affairs that crosses the sharp "line" this Court has drawn in *Oliphant*, the question becomes one of national significance. On this point alone, this Court's must draw the line as a constitutional matter under the ICRA and grant the petition.

Finally, the JAN cannot accomplish in a tribal administrative proceeding what *Oliphant* prohibits it from doing in its own tribal forums. The magnitude of these implications alone is a compelling reason to grant the petition. The consequences of the JAN's illegal exercise of "criminal jurisdiction" masquerading as a tribal employment dispute wrecked havoc and punishment on Officer Gallegos and his family just as though he had been prosecuted by the federal government and convicted of crimes enumerated in 18 U.S.C. He was fired while his personal belonging were stolen by JAN employees and he cannot find gainful employment in his chosen profession due to the totally unjustified blemish on his outstanding record.

No.

IN THE

Supreme Court of the United States

PHILLIP GALLEGOS, PETITIONER

v.

JICARILLA APACHE NATION, A FEDERALLY RECOGNIZED INDIAN TRIBE; CLAUDIA VIGIL-MUNOZ, STANFORD SALAZAR, TROY VICENTI, TYRON VICENTI, HERBERT MUNIZ, CARSON VICENTI, LESTER ANDRES, AND RONALD JULIAN, AS TRIBAL COUNCIL MEMBERS AND INDIVIDUALLY; HOYT VELARDE, DOREEN VIGIL, LEESON VELARDE, ISAAC ROYSTON, TIMOTHY ANDERSON, ESTEBAN BLANCO, LILLIAN VENENO, AND TINA GOMEZ, AS TRIBAL EMPLOYEES AND INDIVIDUALLY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CONCLUSION

For these foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 02-2347

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PHILLIP GALLEGOS,
Plaintiff - Appellant,

v.

JICARILLA APACHE NATION, a federally recognized Indian tribe; CLAUDIA VIGIL-MUNOZ, STANFORD SALAZAR, TROY VICENTI, TYRON VICENTI, HERBERT MUNIZ, CARSON VICENTI, LESTER ANDRES, and RONALD JULIAN, as Tribal Council members and individually; HOYT VELARDE, DOREEN VIGIL, LEESON VELARDE, ISAAC ROYSTON, TIMOTHY ANDERSON, ESTEBAN BLANCO, LILLIAN VENENO, and TINA GOMEZ, as Tribal employees and individually,
Defendants - Appellees.

November 28, 2003, Filed

COUNSEL: For Phillip Gallegos, Plaintiff - Appellant: Hannah B. Best, Albuquerque, NM. Dennis G. Chappabitty, Sacramento, CA.

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